



Proposed Regulation Agency Background Document

Agency name	Department of Mines, Minerals and Energy
Virginia Administrative Code (VAC) citation	4 VAC 25 -130
Regulation title	Virginia Coal Surface Mining Reclamation Regulations
Action title	Amendments regarding the administrative hearing process, consistency with federal regulations, and civil penalties
Date this document prepared	March 3, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The proposed action amends the Virginia Coal Surface Mining Reclamation Regulations to: revise references to sections in the Virginia Administrative Process Act to reflect its current numbering; provide direction as to where requests for formal administrative review and notices of judicial appeal shall be filed; maintain consistency with corresponding federal amendments regarding survey requirements and the rebuttable presumption of subsidence determinations; maintain consistency with federal regulations regarding thick overburden; maintain consistency between requirements for surface mines and underground mines; and increase the civil penalties for violations of the Virginia Coal Surface Mining Control and Reclamation Act that result in personal injury or fatality consistent with amendments to the Act.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The Department of Mines, Minerals and Energy (DMME) has authority to promulgate this regulation under authority found in § 45.1-161.3, Powers of the Department, § 45.1-230, Authority and duties of Director, and § 45.1-242, Performance standards.

- Section 45.1-161.3 empowers DMME, with the approval of the Director, to promulgate regulations necessary or incidental to the performance of duties or execution of powers under Title 45.1 of the Code of Virginia.
- Section 45.1-230 of the Code of Virginia empowers the DMME Director to promulgate regulations as may be necessary to carry out the provisions of the Virginia Coal Surface Mining Control and Reclamation Act, chapter 19 of Title 45.1 of the Code.
- Section 45.1-242 of the Code of Virginia directs the DMME Director to, by regulation, establish performance standards applicable to all surface mining and reclamation operations. Establishment of these performance standards by regulation is mandatory.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

Amendments of the administrative hearing regulations in the Coal Surface Mining Reclamation Regulations (4VAC25-130-700.12, 773.21, 775.11, 800.51, 842.15, 843.12, 843.13, 843.15, 845.18, and 845.19) are being made to update references to the Virginia Administrative Process Act. This is to ensure that the agency, industry, and public are provided with the correct and updated section references of the Virginia Administrative Process Act.

Amendments to 4VAC25-130-775.11, 775.13, 800.51, 843.13, 843.16, and 845.19 are made to provide direction as to where requests for formal administrative review and notices of judicial appeal shall be filed. These will ensure a consistent administrative and judicial review process for all parties to a contested action/decision and make this regulation consistent with recent changes to DMME's Public Participation Guidelines.

Amendments to 4VAC25-130-784.20 and 817.121 are made to be consistent with the corresponding federal amendments regarding survey requirements and the rebuttable presumption of subsidence determinations. The U. S. Court of Appeals vacated the federal rules on April 27, 1999; whereupon, the Federal Office of Surface Mining suspended its rules effective December 22, 1999. As provided by 4VAC25-130-700.2 of the Virginia Coal Surface Mining Reclamation Regulation, *"These regulations are promulgated pursuant to Chapter 19, Title 45.1 of the Code of Virginia (1950) as amended. In order for these regulations to receive approval by the United States Secretary of the Interior as part of the Commonwealth's permanent regulatory program, the Federal Surface Mining Control and Reclamation Act requires that these regulations be consistent with (as effective as) applicable regulations issued by the Secretary, contained in 30 CFR Chapter VII."*

Section 4VAC25-130-816.105 is being amended to ensure it addresses "thick overburden" conditions. The current version is essentially a duplication of 4VAC25-130-816.104, which pertains to "thin overburden" conditions. The amendment will ensure the Virginia regulation is consistent with the federal rule, 30 CFR 816.105.

Sections 4VAC25-130-817.11 and 817.64 are being amended to make requirements for signs and markers and blast monitoring for surface areas at underground coal mines consistent with those for surface coal mines.

Chapter 3 of the 2005 Virginia Acts of Assembly (HB 2573) increased the civil penalties for violations of the Virginia Coal Surface Mining Control and Reclamation Act that result in a personal injury or fatality. Sections 4VAC25-130-845.13, 845.15, and 846.14 of the regulations are being amended to provide that a civil penalty up to \$70,000 may be assessed for a violation that results in personal injury or fatality, consistent with amendments to the Act.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The proposal involves changes to existing regulations. The proposed changes will: update references to Virginia Code sections to reflect the renumbering of the Administrative Processes Act; provide current information regarding the administrative hearing process; ensure regulations regarding subsidence are consistent with the federal rules; make regulations dealing with signs and markers and blast monitoring for surface areas at underground coal mines consistent with those for surface coal mines; ensure regulations regarding thick overburden are consistent with the federal rules; and revise the civil penalty system to address violations that result in personal injury or fatality. See "Detail of Changes" below.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The proposed changes correct and clarify a number of regulatory sections dealing with administrative hearings. These changes provide clearer instructions and will be advantageous to companies or individuals wishing to appeal agency regulations or decisions.

Proposed changes dealing with pre-mining survey requirements and the rebuttable presumption of subsidence determinations are being made to provide consistency with federal regulations.

Increased expenses for boundary markers and blast monitoring at underground coal mines may be considered disadvantages to businesses engaged in the mining of coal, however these changes are required to maintain consistency between requirement for underground mines and surface mines. Increased civil penalties for violations causing injury or death may also be considered disadvantages for the mining industry. These changes, however, represent important improvements to the safety of people living or working near coal mines and are required by the Virginia Coal Surface Mining Control and Reclamation Act.

These changes will have little impact on the agency, and no disadvantages are anticipated for the public or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

Only the requirements for signs and markers and blast monitoring at underground coal mines are more restrictive than federal regulations. These changes are required to fulfill the mandate of Chapter 3 of the 2005 Virginia Acts of Assembly (HB 2573), and to maintain consistency between requirements for underground mines and surface mines.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

The proposed regulatory amendments apply to any locality in which coal mines operate. Currently, coal mines are operating in seven counties in southwestern Virginia: Buchanan, Dickenson, Wise, Lee, Tazewell, Russell, and Scott.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping, and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email, or fax to:

Gavin M. Bledsoe, Legal Services Officer
Department of Mines, Minerals and Energy
P.O. Drawer 900, Big Stone Gap, Virginia, 24219-0900,
telephone (276) 523-8157, FAX (276) 523-8163
e-mail gavin.bledsoe@dmmme.virginia.gov.

Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>The regulation will be enforced under an existing regulatory program with existing personnel; no additional cost to the state is anticipated.</p>
<p>Projected cost of the regulation on localities</p>	<p>There will be no cost to localities.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>The proposed regulation will affect companies engaged in the mining of coal.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are currently about 70 active surface coal mines and 150 active underground coal mines in Virginia. These regulations affect only surface mining operations, including the surface portions of underground mines. The companies responsible for these operations are not small businesses by this definition.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>Amendments regarding code section references, directions for hearings and appeals, and consistency with federal regulations are being made for accuracy and consistency. They will not change current practices and therefore should entail no additional costs to individuals, businesses, or other entities.</p> <p>Amendments herein regarding boundary markers and blast monitoring will only affect the surface portions of underground coal mines. These areas are small, generally less than 20 acres, and areas above occupied buildings requiring fluorescent or reflective boundary markers are rare. Operations are usually concluded within a few years. Surface blasting occurs only in the first weeks of the operation. Therefore, any incremental costs from the new requirements are likely to be small.</p> <p>Increased maximum civil penalties from \$5000 to \$70,000 for violations that result in injury or death will likely have a fiscal impact on companies who are in violation of the safety provisions in the surface mining regulations; companies who remain in compliance will experience no fiscal impact.</p> <p>No additional administrative costs are anticipated.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Amendments to sections dealing with administrative hearings update cross references to the Virginia Administrative Process Act to reflect the new numbering system after recodification. Amendments to sections dealing with administrative review and judicial appeal are intended to provide direction as to where requests should be filed. The alternative of not amending these sections would have left unresolved inconsistency and uncertainty in the administrative/judicial review processes for our customers.

Sections dealing with civil penalties are being amended in response to Chapter 3 of the 2005 Virginia Acts of Assembly (HB 2573). DMME has no alternative to this action that would meet this mandate. In implementing these changes, DMME is proposing to use a point system consistent with our system for calculating other civil penalties. This point system, which is already familiar to our customers, is considered better than alternatives such as a new or less familiar system.

Sections dealing with subsidence and thick overburden are being amended to assure consistency with federal regulations. No other alternative would meet the requirement that Virginia's regulations are as effective as, but no more restrictive than, the related federal regulations.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Less stringent compliance or reporting requirements, including the exemption of small businesses, would not meet the agency's goal of assuring that mining occurs in a safe and environmentally sound manner. The existing regulations govern established practices in the mining industry; these amendments represent small changes to the existing regulations and therefore will have a minimal impact on businesses.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

The agency received no comments in response to the NOIRA for these amendments.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The amendments are being promulgated as part of the recommendations from a Department of Mines, Minerals and Energy report of a coal mining accident in Wise County that resulted in the death of a three-year old child. By ensuring consistency and strengthening penalties for violations, the amendments will increase the safety and welfare of families in areas near coal mines.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

The Department of Mines, Minerals and Energy is proposing amendments to sections of the 4VAC25-130 Coal Surface Mining Reclamation Regulations as described in the following table.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-700.12(e)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
4VAC25-130-773.21(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act
4VAC25-130-775.11(b)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-775.11	(d)	Requests for administrative review of the agency’s decision shall be filed with the Director or his designee.	Add subsection (d) to inform that requests for hearings and appeals for review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.
4VAC25-130-775.13	(c)	Notice of appeal for judicial review would be filed with the Director or his designee.	Add subsection (c) to inform that a notice of appeal for judicial review of a Hearing Officer’s final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.
4VAC25-130-784.20(a)(3)	N/A	A permit applicant is required (unless denied access for such purposes by the owner) to conduct a survey of certain features, which were within the area that may be adversely impacted by proposed underground mine works (within a specific angle of draw from the outer most extent of). The features included non-commercial buildings, occupied dwellings and related structures, drinking, domestic and residential water supplies. The permit applicant was also required to notify owners of such features that a denial of access would remove the rebuttable presumption that subsidence from the operation caused any postmining damage to protected structures.	The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective 12/22/1999. The regulation is amended to remove this subsection to be consistent with the Federal Rule (30 CFR 784.20(a)(3)) (64 FR 71652) .

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-800.51(c)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-800.51(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Insert “Department of Mines, Minerals and Energy” for clarification and consistency with other sections of the Act.
4VAC25-130-816.105(a) & (b)	N/A	The current regulation does not address “thick overburden” but instead reiterates the requirements for “thin overburden” situations of 4VAC250130-816.104. .	Correct the regulation so that it addresses “thick” overburden to be consistent with the Federal Rule (30 CFR 816.105). Thin overburden is addressed under Virginia Rule 4VAC25-130-816.104 and 30 CFR 816.104.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4 VAC 25-130-817.11(a)	N/A	Signs and markers on permitted coal mines must be made of durable material and be maintained during the conduct of all activities to which they pertain.	<p>In addition to being made of durable material and properly maintained, permit boundary markers on areas that are located on steep slopes above private dwellings or other occupied buildings will also be required to be made of or marked with fluorescent or reflective paint or material.</p> <p>This change is essential to protect the safety and welfare of persons living or in occupied buildings near coal mines. Workers on coal mines in areas located on steep slopes above residences or occupied buildings must have clear knowledge of the mine's boundary location. If operations move beyond these boundaries, there is increased risk of releasing material off of the site. This change makes the regulation for surface areas at underground coal mines consistent with that for surface coal mines.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4 VAC 25-130-817.64	(d)	When blasting with explosives on coal mines, the coal mine operator may use a formula, called the scaled distance equation, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period and not be required to monitor blast with a seismograph.	<p>Add subsection (d) to require that seismic monitoring be employed whenever blasting operations on a surface coal mine are conducted within 1,000 feet of a private dwelling or occupied building. This change will eliminate the exception for seismic monitoring when the scaled distance equation is used for blasting near occupied buildings.</p> <p>This amendment is essential to protect the safety and welfare of persons living near blasting operations on coal mines. Persons and property are at risk from blasting due to air blast, ground vibration, or fly rock from improper blasting. Blasting is the most common source of complaints about coal mining operations. Monitoring every blast close to occupied buildings will enable the Department of Mines, Minerals and Energy to better determine whether blasts on coal mines exceed the maximum air blast and ground vibration requirements in the regulation. This change makes the regulation for surface areas at underground coal mines consistent with that for surface coal mines.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-817.121(c)	N/A	(c)(4) (i) through (iv) of the regulation provided that if damage to any non-commercial building or occupied residential dwelling or structure related thereto occurred as a result of earth movement within an area determined by projecting a specific angle of draw from the outer most boundary of an underground mine workings to the surface of the land, a rebuttable presumption would exist that the permittee caused the damage.	The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective 12/22/1999. This change will revise subpart (c)(4) of Virginia's Rule to be consistent with the Federal Rule by deleting subsections 4(i) through (iv).
4VAC25-130-842.15(d)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.12(j)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.13(b)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.13(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency's decision shall be filed with the Director or his designee.	Insert "Department of Mines, Minerals and Energy" for clarification and consistency with other sections of the Act.
4VAC25-130-843.15(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-843.16(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Insert “Department of Mines, Minerals and Energy” for clarification and consistency with other sections of the Act.
4VAC25-130-845.13(c), (d), (e) & (f)	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000.	<p>This part is amended to correct typographical errors in (c)(1) and (d).</p> <p>Subparts (e)(1) and (f) are amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person. The penalty for an violation resulting in personal injury or fatality would exclude the history consideration and the penalty would be determined by multiplying the base penalty value (maximum of \$3,500) under the point system by a factor of 20, not to exceed \$70,000 per violation.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-845.15(a)	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000. The Division may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.
4VAC25-130-845.18(b)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-845.19(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-845.19(d)	(d)	Requests for administrative review and notice of appeal for judicial review of the agency's decision shall be filed with the Director or his designee.	Add subsection (d) to inform that requests for hearings and appeals for review and reconsideration and a notice of appeal for judicial review of a Hearing Officer's final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-846.14(b)	N/A	Individuals of a corporate permittee may be subject the individual civil penalty assessment under this Part. The penalty shall not exceed \$5,000 for each violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.